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NO. 931462 MAR 7 1994

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Petitioners

v.

JOSE RAMON MORALES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws contained in Article I, section 9, clause 3 and Article I, section 10 of the U.S. Constitution?

This issue is identical to that presented in Cavanaugh v. Roller, No. 92-1510, cert. granted, __U.S.__, 113 S.Ct. 2412, cert. dismissed as improvidently granted, ___U.S.__ 114 S.Ct. 593. The underlying case in No. 92-1510 is Roller v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993).

LIST OF PARTIES

Petitioners are the California Department of Corrections, a state department which administers state prisons and other correctional programs; the Attorney General of the State of California, a California constitutional officer who is the chief law enforcement officer of the state; the California Board of Prison Terms, a state board which determines the terms, conditions, and dates of parole for adult state prisoners; and E.R. Meyers, the warden of the institution where respondent was incarcerated at the time respondent filed the underlying petition for a writ of habeas corpus.

Respondent is a state prisoner who has been convicted of murder in 1971 and 1980.

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JOSE RAMON MORALES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners California Department of Corrections, et al., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1994. That opinion deals with the circumstances under which a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws. In particular, this case involves a federal question of great importance, the nature and quality and burden of proof required to make a showing of detrimental impact as to an ex post facto claim. S.Ct. Rule 10.1(a), 10.1(c).

In addition, the instant case involves a legal issue

In addition, the instant case involves a legal issue resolved in different ways by different courts of appeals (Roller v. Cavanaugh, 984 F.2d 120, 123 (4th Cir. 1993), cert. granted 113 U.S. 2412, cert. dm. 114 S.Ct. 593; Akins v. Snow, 922 F.2d 1558, 1564 (11th Cir. 1991), cert. den. 111 S.Ct. 2915 at ftn. 12; Bailey v. Gardebring, 940 F.2d 1150, 1157 (8th Cir. 1991), cert. den. 112 S.Ct. 1516) and presents a federal question resolved in a way in conflict with a state court of last resort (In re Jackson, 703 P.2d 100 (Cal. 1985); Morales v. Cal. Dept. of Corrections, Appendix A at 1575, ftn. 5).

OPINION BELOW

The opinion for the Court of Appeals for the Ninth Circuit will be reported in the third series of the Federal Reporter and is reprinted in the appendix submitted with this Petition. Appendix A.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1) and Supreme Court Rule 10.1.

STATUTE INVOLVED

The statute involved is subdivision (b) of California Penal Code section 3041.5, as amended in 1977 and in 1981. The 1977 version of section 3041.5(b) stated:

> (2) Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. The board shall hear each case annually thereafter.

This version was effective until the enactment of section 4, chapter 111 of the 1981 California Statutes. As amended, subdivision (b) read as follows:

> (2) Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.
>
> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

Because of subsequent amendments, the provision is now section 3041.5(b)(2)(B).

STATEMENT OF THE CASE

a. Factual background.

A bare recitation of the relevant facts is made in the first, or background, section of the Ninth Circuit opinion. In 1971, respondent was convicted of first degree murder. After being transferred to a half-way house in April 1980, he married. He was paroled in May 1980 and his wife disappeared two months later and was later found dismembered.[1/] Appendix A at 1571 et seq., ftn. 8.

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1. The probation report, exhibit 6 to Supplemental Appendix C, at 468-469 and 474-5 states:

> The victim in the [murder was] a 75-year-old . . . whom [respondent] met when she visited prison inmates. She had visited [respondent] frequently in prison . . . and . . . tried to convert him to her religion, Christian Science. After [respondent] was transferred to Los Angeles to a [prison] half-way house on April 14, 1980 in anticipation of his upcoming parole, she visited him in Los Angeles for one day on April 30, 1980 and secret[]ly married him. She then returned to her home . . . and told friends that she was moving to Los Angeles to live with [respondent]. She left her home July 4, 1980 and was reported missing by her family July 31, 1980. Three days later [her] left hand was found on the freeway . . .

Respondent then pleaded no contest to second degree murder of his wife and his initial parole consideration was held on July 15, 1989. The California

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> After the hand was found it was learned that [respondent] had obtained possession of the deceased's vehicle and had used her credit cards, forging her name. . . . At the time of the arrest [respondent] was in possession of the deceased's car, her purse, credit cards, and her diamond rings. [Her] body has never been found.

The probation officer concluded:

> . . .[T]o regard [respondent] as anything less than a deliberate, calculating, cold-blooded murderer would be untenable. . . . [T]here can be no uncertainty regarding the cruelty he exhibited in both of the murders of which he has been convicted and in both of which he denies guilt.
>
> The danger [respondent] presents cannot be overemphasized and in the best interests of society, it is hoped that he will remain in prison for the rest of his life. <u>If and when parole is ever considered it is hoped that those persons responsible for making this decision will remain cognizant of [respondent's] proven violence and resist whatever manipulative techniques he may devise in the future</u>. [Emphasis added.]

<u>Id.</u> at 479-480.

Board of Prison Terms found respondent unsuitable for parole and set a hearing three years in the future.[2/]

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2. The following is the relevant portion of the August 22, 1989 parole suitability report:

> 1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime is very trivial in relation to the offense. . .
>
> 2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failed previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.
>
> The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree[] murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.
>
> 3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

> 4. Psychiatric factors. . . . The reports state[] as fol[l]ows:
>
> > "A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."
> >
> > "If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders." [Emphasis added.]
>
> The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.
>
> The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable. . . .
>
> Based on the information contained in the record and considered at the hearing, the panel concludes and states, as is required by PC sections 3043 and 3043.5, that the prisoner would pose a threat to public safety if released on parole.

Therefore, the prisoner is found unsuitable for parole.

In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:

1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the vi[c]tim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.

2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.

3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.

4. The recent Psychiatric Evaluations . . . indicated a need for a longer period of observation and evaluation or treatment.
The next hearing will be scheduled in three years.

Supp. Appendix C, Exh. 4 at 4-7.

Respondent filed a petition for a writ of habeas corpus, alleging in pertinent part that he was the victim of an ex post facto change in the frequency of the parole consideration hearings. Id. at 1571-2.

b. Procedural background.

Respondent filed his petition for habeas corpus in the district court for the Central District of California on December 26, 1991. The petition contained several arguments regarding procedural error which are not at issue in this Petition. Supp. Appendix B, Memorandum at 5-6. On December 27, 1991, the district court issued an order to show cause on the petition.

The return was filed on February 24, 1992. Supp. Appendix C. On May 18, 1992, the magistrate judge issued a report which recommended the denial of all issues save the parole issue presented in this Petition. Supp. Appendix D at 13-14. On August 20, 1992, the district court issued an order and judgment rejecting the ex post facto claim and dismissing the entire petition. Supp. Appendix E at 5. A certificate of probable cause issued on September 24, 1992. Supp. Appendix F. The February 9, 1994 opinion of the Ninth Circuit is set forth in Appendix A.

Petitioners intend to file a motion for judicial notice of materials relating to the legislative history of section 3041.5(b)(2) and to the fiscal impact of the Morales decision.

REASONS FOR GRANTING THE WRIT

AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS NOT AN EX POST FACTO LAW

The Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." Appendix A at 1575. Whether those "opportunities" were substantial and detrimental under the second prong of Weaver v. Graham, 450 U.S. 24, 32 (1981) is the central issue of this case.

The Ninth Circuit found that the 1981 amendment was detrimental to respondent because it assumed that the greater the number of parole hearings, the greater the probability of parole:

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the

> sentence and violate the ex post facto clause. [Emphases added.]

Appendix at 1574. The syllogism is flawed and the Ninth Circuit opinion falls with the syllogism. Weaver requires proof by the inmate that he has been disadvantaged (Weaver v. Graham, supra at 29), not speculation and supposition of harm.

a. The 1977 enactment of the California Determinate Sentencing Law.

Prior to July 1, 1977, California law did not require annual parole suitability hearings. In re Jackson, 703 P.2d 100, 101 (Cal. 1985). On July 1, 1977, the determinate sentencing law (DSL)[3] went into effect and set the stage for the instant case. See generally Way v. Superior Court, 141 Cal.Rptr. 383, 386-387 (Cal.Ct.App. 1977); People v. Community Release Board[4], 158 Cal.Rptr. 238, 240 (Cal.Ct.App. 1979).

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3. The main feature of the law, determinate sentencing from a range of three sentence terms for crimes committed in the future, does not affect this case. California Penal Code section 1170.

4. The Community Release Board was the predecessor to the current Board of Prison Terms. The Board determines parole suitability for California state prison inmates and is authorized by California Penal Code section 5075 et seq.

Those who had received a life sentence prior to 1977 were dealt with under California Penal Code section 1170.2(e). That section states:

> In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1168 [indeterminate life sentencing] if the felony was committed on or after July 1, 1977, the Board of Prison Terms shall provide for release from prison as provided by this code.

The Board's duties and the procedural steps with regard to parole are set forth in pertinent part in California Penal Code section 3041.5. The instant case centers on subdivision (b) of that section, relating to the frequency of parole eligibility hearings, as it was enacted in 1977 and as it was subsequently amended for multiple murderers in 1981.

b. The 1977 and 1981 amendments to California Penal Code section 3041.5(b).

Between 1977 and 1981, annual parole eligibility hearings were required by section 3041.5(b)(2). In pertinent part, that provision then read: "The board shall hear each case annually thereafter." In 1981, subdivision (b) of that section was amended to permit hearings every second or third year for multiple murderers within the Board's discretion, if the requisite findings were made.

> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

These amendments concern those who stand convicted of more than one offense which involve the taking of a life. The net effect was to delete annual parole eligibility hearings, not parole itself, and substitute a hearing within three years for those whom the Board found did not possess a reasonable expectation of parole in the intervening years. The statute plainly states that annual suitability hearings would be held and that extension of the hearings would occur if and only if the proper discretionary findings could be made by the Board.

c. Caselaw exploring the ex post facto ramifications of the 1977 and subsequent amendments.

1. Interpretation of the 1982 amendment to section 3041.5 as a prologue to judicial interpretation of the 1981 amendment.

The first major case exploring the ex post facto ramifications of the enactment of DSL involved a 1982 amendment not affecting respondent in the instant case. In re Jackson, supra. In 1982, section 3041.5(a) was amended to permit hearings every two years for all inmates sentenced under the determinate sentencing law with no parole dates. The procedure for all eligible inmates in 1982 and after was as follows:

> The parole considerations procedures are governed by section 3040 et seq. and apply to all inmates not serving a determinate sentence [i.e. without a determinate term pronounced by the sentencing court]. (Section 1170 et seq.; see sections 3041, 3000.) Once such an inmate has served sufficient time to be eligible or soon eligible for parole, he or she receives notice that a parole suitability hearing before a Board hearing panel will be held. (Sections 3041, 3041.5, 3042.) [Various procedural rights, including the right to counsel, apply.] (Sections 3041.5, 3041.7, 3042; Cal.Admin.Code, tit. 15, sections 2245-2256.)

In re Jackson, supra at 102. Following the hearing, the Board must set a date for release on parole unless it makes certain findings and if it does make detrimental findings, another hearing is set for the next year unless the Board makes other detrimental findings. California Penal Code section 3041.5(a). In that instance, the next hearing will be in two years.

Jackson involved a claim by an inmate who was convicted in 1961. At that time, there was no provision for annual hearings. He appeared at an initial 1983 hearing and was found unsuitable for parole. His next hearing was scheduled for two years hence under the 1982 amendment. Jackson, on state habeas corpus, claimed that he was entitled to annual review under the 1977 procedures. The California Supreme Court found that the change from one-year to two-year hearings was not an ex post facto law:

> Although the issue is close, this court holds that the 1982 amendment is a procedural change outside the purview of the ex post facto clause. The amendment did not alter the criteria by which parole suitability is determined. . . . Nor did it change the criteria governing an inmate's release on parole. . . . Most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. . . . Instead, the 1982 amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability. . . This change did eliminate the possibility that a parole date would be set within the period of postponement. However, the likelihood that the postponement actually delays release on parole until after the next hearing appears slight. [Emphasis added.]

In re Jackson, supra at 105. The California Supreme Court noted that the presence of counsel and the

numerous procedural safeguards at the parole hearing provided "insurance that any postponement decision [would] be well-founded." Id. at 106.

Crucial to the Jackson decision are legislative findings which show that the effect of delaying the hearings was slight.

> The two legislative committee analyses which were prepared while the 1982 amendment was pending in the Legislature provide some insight on this point. At the initial parole suitability hearing, which occurs one year before an inmate's minimum eligible parole date (section 3041), 90 percent of inmates are found unsuitable for parole release. At the second and subsequent parole suitability hearings, approximately 85 percent are found unsuitable. . . . In view of these statistics, the 1982 amendment was seen as a means "to relieve the [Board] from the costly and time-consuming responsiblity of scheduling parole hearings for prisoners who have no chance of being released."

Id. at 106. Moreover, the Jackson case involved a finding of unsuitability for parole. The record contained no evidence "as to how often, if ever, a determination of parole suitability results in an inmate's release on parole soon after a suitability determination. [Emphasis in original.]"

> Such evidence would obviously be relevant to whether inmates are actually disadvantaged-in terms of serving longer prison terms-as a result of a hearing postponement.

Id. Unlike the changed computation of eligibility in Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1100, only the frequency of parole suitability hearings was affected by the 1982 amendment. In re Jackson, supra at 108. Unlike the "gain-time" credits in Weaver v. Graham, 450 U.S. 24 (1981), there was no certain release date to be affected by the amended law in question. In re Jackson, supra at 107. In sum, there was no certain release date to be affected by the amendment and no evidence of any untoward effect on any possible release date.

2. Judicial construction of the 1981 amendment.

The instant case is an attempt to address a problem similar to that explored in Jackson, the ex post facto ramifications of the 1982 amendment. Here an inmate who was clearly entitled to annual hearings at the time of his offense, the offense having occurred after 1977, but who committed the offense prior to the 1981 amendment regarding multiple taking of lives, claims that the 1981 amendment materially increases his punishment and is therefore an ex post facto law. In this situation, Weaver commands an inquiry into whether a retrospective state statute ameliorates or worsens conditions imposed by its predecessor. Weaver v. Graham, supra at 33. Notwithstanding the plain requirement of detriment set

forth in Weaver, Morales states that because an eligibility hearing is a precedent to parole, fewer hearings mean a smaller chance of obtaining parole.

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. [Emphasis added.]

Morales v. Cal. Dept. of Corrections, Appendix A at 1574. Such an assumption does violence to the structure of state law and to the nature and burden of proof in ex post facto litigation. Morris v. Castro, 212 Cal.Rptr. 299, 302 (Cal.Ct.App. 1985).

The Ninth Circuit error in this case tracks Roller v. Cavanaugh, supra at 123. Roller first declares that there is a conflict among the circuits as to the ex post facto effect of diminishing the number of parole eligibility hearings:

> Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the ex post facto clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979). . .; . . . Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988), vacated 886 F.2d 1093 (9th Cir. 1989)[5]; Akins v. Snow, 922 F.2d 1558 (11th Cir. [1991]), cert. den. . . . 111 S.Ct. 2915 . . . ; but see Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991), cert. den. . . . 112 S.Ct. 1516.[6]

Examination of the cases cited in Roller, with the exception of Bailey, shows that each, as the Ninth Circuit did in the instant case, assumed without proof in the record that the chances of parole are increased if more hearings are held. Each proceeds to judgment without a positive showing of detriment to the inmate, thus failing to meet the second prong of Weaver. Akins v. Snow, supra at 1563. In each, and in the instant Morales opinion, the appellate courts rely on suppositions. For example, in Rodriguez v. United States Parole Comm'n, supra at 176, the word "might" is the operative word.

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think

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5. It is odd that the Fourth Circuit counted the Ninth Circuit in its camp on the basis of Watson I, 859 F.2d 105. As noted in the Roller opinion, Watson II vacated Watson I and reversed Watson I's conclusions. 886 F.2d 1093-1094.

6. Other listings of relevant cases are contained in Akins v. Snow, supra at 1564, ftn. 12 and U.S. Parole Commission Guidelines for Federal Offenders, 61 ALR Fed. 135, 155-159 (1983).

> that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing.

None of these decisions relies on actual proof of detriment. Rodriguez simply assumes that fewer hearings must be detrimental. Akins assumes that because an eligibility hearing is part of the process which leads to parole, fewer hearings are detrimental. Roller compounds the error by confusing detriment with the inmate's negative subjective reaction to being in prison for a year and then unfairly castigates the parole authorities for failing to prove the negative of what the inmate failed to prove, the actual detriment under the Weaver second prong.

None of these cases comes to grips with the issue of detriment in the manner that Jackson does. In Weaver, the reduction in "gain-time" accumulation must inevitably lengthen the term of imprisonment. No inevitable result flows from a decrease in the frequency of parole eligibility hearings and there is nothing in the record approximating the kind of proof of detriment which appears in Weaver or lack of detriment in Jackson.[7]

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7. The nature of proof of ex post facto violation has recently been explored by the Ninth Circuit. Powell v. Ducharme, 998 F.2d 710 (9th Cir. 1993) in pertinent part involved a claim that under a new parole law the inmate had to be considered for parole at the end of 30 years. The inmate contended this meant that he could not be paroled before the end of this term. However, the Ninth Circuit found that the parole board could redetermine the inmate's discretionary minimum term at any time, including prior to the expiration of his discretionary minimum term.

The Ninth Circuit has erred in ordering three times as many hearings as required by the California Legislature on the basis of mere supposition. There is nothing in the record to indicate that an inmate whose parole suitability hearings come every second or third year instead of annually is being deprived of an earlier parole. There is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character. It is the nature of the individual which counts and the findings required by statute for extension of the hearings reflect the inherent discretion of the Board to make evaluations and

> Whether the "likelihood" of an earlier parole hearing has been diminished is a question that cannot be answered. It is impossible to make a quantitative comparison between [the new law]. requiring a parole hearing at a certain date, and [the former law], which left such a determination to the unfettered discretion of both the superintendent of the institution and the Board. . . . Such predictions of how the superintendent or the Board would have exercised their discretion have no basis in law.

Id. at 715. Put another way, speculation cannot be used to determine whether a new law prejudices an inmate.

predictions of suitability for parole. California Penal Code sections 3041(b), 3041.5(b)(2). Indeed, if the Board in its discretion finds that "it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding" (California Penal Code section 3041.5(b)(2)), that finding directly and positively negates any inference of prejudice to the inmate which might otherwise be made on a silent record. See footnote 2, supra. It is inconceivable than any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his minimum term of imprisonment given the horrendous record in this case.

The Ninth Circuit ignores this legislative provision in the instant opinion and yet a review of the Board's findings indicates there was more than ample reason to postpone the next annual hearing. These findings show that annual hearings would be an exercise in futility for respondent. Therefore, respondent was not detrimentally affected by postponement because he had no "reasonable" expectation that the next annual hearings, were they to be held, would result in the granting of parole.

Moreover, it is clear that the timing of the hearings does not alter the fundamental discretion of the Board to grant parole, especially in light of the determination made by the Board when the decision to utilize section 3051.5(b)(2) was made. Where the alteration in parole procedures does not vitiate "individualized consideration" from the parole board, there is no ex post facto issue. Eason v. Dunbar, 367 F.2d 381, 382 (9th Cir. 1966), cert.

den. 386 U.S. 947; Zeidman v. U.S. Parole Commn., 593 F.2d 806, 808 (7th Cir. 1979); see Rifai v. U.S. Parole Commn., 586 F.2d 695 (9th Cir. 1978). Where a parole rule[8/] is not so overly intrusive that it substantively affects the review standard, it is deemed procedural and there is no ex post facto violation. Griffin v. State, 433 S.E.2d 862, 864 (S.C. 1993), overruling Gunter v. State, 378 S.E.2d 443 (S.C. 1989); see Freeman v. Com'n of Pardons & Paroles, 809 P.2d 1171, 1176 (Ida. 1991). Given the discretion exercised by the Board and embodied in the statutory findings, the change from annual hearings is merely procedural. But see Flemming v. Oregon Board of Parole, 998 F.2d 721 (9th Cir. 1993).

Recent Ninth Circuit rulings, including Powell, Flemming and Morales, indicate that there is substantial ambiguity about what comprises substantial harm for the purposes of determining an ex post facto issue. In particular, the Ninth Circuit seems to be grasping at some yet-unarticulated test for prejudice and simultaneously rejecting the utilization of discretion as a factor of consequence. However, it is doing so in direct contradiction of the holdings of the California Supreme Court and at least one of the federal courts of appeal. Moreover it does so in apparent ignorance of the ameliorative and responsible requirement of findings for postponement directed by the California Legislature. This

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8. Morales directly contradicts Jackson as to whether the procedural classification is of any legal moment. Morales v. Cal. Dept. of Corrections, Appendix A at 1575, ftn. 5.

Court must indicate, once and for all, what harm is and how it may be measured for ex post facto purposes.

CONCLUSION

The Ninth Circuit erred in this case because it substituted a supposition of harm for the showing of substantial detriment required by Weaver. The Board has been given discretion to determine parole suitability upon certain statutory criteria and to defer future hearings upon certain statutory criteria. The Ninth Circuit has sought to upset the structure of paroles within the state by micromanaging the timing of hearings without any showing of possible detriment to the inmate amounting to Weaver second prong harm. In doing so, the Ninth Circuit has chosen to ignore the fact that the statutory findings mandated by subdivision (b) clearly establish that there is no prejudice to the inmate from the postponement. At the very least, there is nothing in the record that gainsays these statutory findings.

This Court should grant the petition for certiorari and issue an opinion reversing the Ninth Circuit and defining under what circumstances, if any, procedural changes in the parole process offend the prohibition against ex post facto laws and clarifying the quantum and burden of proof with regard to an ex post facto violation.

DATED: March 1, 1994

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE RAMON MORALES, a/k/a PABLO JOSE RAMON MORALES,
Petitioner-Appellant,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS; E.R. MEYERS, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; BOARD OF PRISON TERMS,
Respondents-Appellees.

No. 92-56262
D.C. No. CV-91-6996-HLH
OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted July 15, 1993*
Submission deferred July 19, 1993
Resubmitted December 7, 1993
Pasadena, California

Filed February 9, 1994

Before: Floyd R. Gibson,** Cynthia Holcomb Hall, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Gibson

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*This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**The Honorable Floyd R. Gibson, Senior Circuit Judge from the Eighth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Parole/Ex Post Facto Laws

The court of appeals affirmed in part a district court judgment, reversed in part, and remanded. The court held that retrospective application of a state law that allows parole hearings to be delayed for up to three years violates the Ex Post Facto Clause.

Appellant Jose Morales pleaded nolo contendere to second degree murder and was sentenced. At the time of Morales' crime, California law provided that the punishment for his crime included annual parole hearings. California's law regarding parole hearings was later amended to grant the California Board of Prison Terms the power to defer parole hearings for all crimes.

The Board conducted an initial parole consideration and found Morales unsuitable for parole. The Board set his next hearing date for three years later. Morales filed a petition for a writ of habeas corpus, alleging, among other things, that the Board's scheduling of his next parole hearing violated his rights under the Ex Post Facto Clause. The district court denied the petition. Morales appealed.

[1] At the time Morales committed his crime, the crime he committed carried with it a punishment that included annual consideration for parole. By retroactively changing Morales' punishment to include consideration for parole only every three years, his sentence was made more onerous, a violation of the Ex Post Facto Clause.

[2] The amendments to California's law regarding parole hearings did not simply change the procedures used to determine whether prisoners were entitled to parole or the methods used to ensure compliance with the terms of parole; they elim-

inated the possibility of parole altogether in the period between hearings.

COUNSEL

Jose R. Morales, Pro per, Soledad, California, for the petitioner-appellant.

Robin M. Miller, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

GIBSON, Senior Circuit Judge:

Jose Morales appeals the district court's denial of his petition for a writ of habeas corpus. We affirm in part and reverse in part.

I. BACKGROUND

In 1971, Morales was convicted for the first degree murder of his girlfriend. When she was found, it was discovered that her thumb had been cut off. After being transferred to a halfway house in April 1980, he married a woman who had visited him during his incarceration. In May, Morales was paroled; his wife disappeared two months later. Approximately two weeks after she disappeared, her hand was discovered on the Hollywood Freeway in Los Angeles. Her body was never recovered.

Morales pleaded nolo contendere to the second degree murder of his wife and was sentenced to an imprisonment term of fifteen years to life. His earliest parole eligibility date was August 2, 1990. On July 25, 1989, the California Board of

Prison Terms ("the Board") conducted an initial parole consideration, found Morales unsuitable for parole, and set Morales' next hearing date three years later. Morales filed a petition for a writ of habeas corpus, alleging that 1) his rights under the ex post facto clause were violated when his next hearing date was scheduled three years later, 2) he was denied parole based on false and perjured information, and 3) he was not sentenced in accordance with California law. The magistrate judge recommended the writ be denied on counts two and three and issued as to count one. The district court adopted the magistrate's report and recommendation as to counts two and three and denied relief on count one. Morales has appealed pro se.

II. DISCUSSION

A. The Ex Post Facto Clause

Critical to the understanding of Morales' ex post facto claim is an understanding of the evolution of California's law regarding parole hearings. "Between 1972 and 1977, it was the judicially approved policy of California that prisoners should be accorded an annual parole suitability review, except that in extreme cases the review could be every two or three years." *Connor v. Estelle*, 981 F.2d 1032, 1034 (9th Cir. 1992) (per curiam) (quotations omitted). During this time period, criminals were sentenced pursuant to California's Indeterminate Sentencing Law (ISL). *Id.* at 1033. In 1977, the California Legislature replaced the ISL with the Determinate Sentencing Law (DSL). The DSL mandated annual parole hearings, Cal. Penal Code § 3041.5(b)(2) (1976), until it was amended in 1981 to allow the Board to decide, in particular situations, to defer a parole hearing for up to three years when the inmate's crime involved multiple murders. The DSL was again amended in 1982 to grant the Board the power to defer parole hearings for all crimes. *See Watson v. Estelle*, 886 F.2d 1093, 1094-95 & n.1 (9th Cir. 1989) (discussing evolution of this aspect of the DSL).

Article I, section 10 of the Constitution prohibits the states from passing ex post facto laws. The implications of this clause are unusually clear:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; *which makes more burdensome the punishment for a crime, after its commission*, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)) (emphasis added). A law violates the restriction if it is applied retrospectively and implicates these well-known concerns. *Id.* at 46.[1] There can be no doubt that the law is being applied retrospectively; for ex post facto purposes, we examine "the actual state of the law at the time the defendant perpetrated the offense," *Watson*, 886 F.2d at 1096, and in this case California law required annual review when Morales killed his wife.[2] We thus proceed to the thornier aspect of the inquiry: whether the retrospective application of a law enlarging the time between parole hearings violates the protections envisioned by the clause or, instead, is it merely a procedural change in the law that lacks constitutional implication?[3]

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[1]The Supreme Court actually referred to the clause's "core concerns" as those identified by Justice Chase in *Calder v. Bull*, 3 Dall. 386, 390 (1798). *Collins*, 497 U.S. 41-42. However, the Court went on to describe the *Beazell* formulation as a proper "summary," *id.* at 42; we refer to it instead of *Calder* in the interest of brevity.

[2]This point differentiates this case from *Connor* and *Watson*. In both cases, the petitioners committed their crimes before the DSL was passed. *Connor*, 981 F.2d at 1034; *Watson*, 886 F.2d at 1096.

[3]These two questions are really opposite sides of the same coin. A law that is procedural, by definition, will not implicate the core concerns of the

[1] By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. *Akins v. Snow*, 922 F.2d 1558, 1562 (11th Cir.), *cert. denied*, 111 S. Ct. 2915 (1991). Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. We base this conclusion on the Supreme Court's observation that the denial of parole is a part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974). The Court went on to note that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex cost facto* clause . . . ." *Id.* at 663; *see also Weaver v. Graham*, 450 U.S. 24, 32 (1981) ("effective sentence is altered once" a determinant in the prisoner's prison term is changed).[4] Other circuits have held that "parole eligibility must be considered part of any sentence." *Akins*, 922 F.2d at 1563 (case similar to the one at bar); *see also Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir. 1989) ("retrospective application of a statute modifying or revoking parole eligibility would" be ex post facto); *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040, 1043 (5th Cir. 1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977) (disallowing consideration of parole factors expressly prohibited at the time the crime was committed). When Morales committed his crime, the crime he committed

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ex post facto clause, *see Collins*, 497 U.S. at 45; on the other hand, a law that implicates the core concerns of the ex post facto clause cannot be described as merely procedural. *See Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981); *United States v. Johns*, 5 F.3d 1267, 1271 (9th Cir. 1993).

[4] *Warden* and other cases cited herein address the ex post facto clause as it applies to Congress, U.S. Const. art. I, § 9; however, the analysis is the same under both clauses.

carried with it a punishment that included annual consideration for parole. By retroactively changing Morales' punishment to include consideration for parole only every three years, his sentence was made more onerous in violation of the ex post facto clause.

The respondents advance two primary arguments to support the retrospective application of the 1981 amendment. First, they argue that the change is merely procedural; second, they argue the change does not adversely affect Morales. We reject both contentions.

[2] A purely procedural change in the law, even if applied retroactively, does not violate the ex post facto clause. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977). A procedural change is one that alters the method used to make a determination; for instance, as in *Dobbert*, a statute that changes the role of the judge and jury in determining whether the death penalty should be imposed, *id.* at 293-94; or, as in *Collins*, a statute allowing an appellate court to reform an improper verdict instead of requiring a new trial. 497 U.S. at 52. However, a law that violates the core concerns of the ex post facto clause "is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12. The DSL's 1981 amendments do not simply change the procedures used to determine whether prisoners are entitled to parole or the methods used to insure compliance with the terms of parole; they eliminate the possibility of parole altogether in the period between hearings. *Cf. Roller v. Cavanaugh*, 984 F.2d 120, 124 (4th Cir.), *cert. dismissed*, No. 92-1510, 62 U.S.L.W. 4007 (Nov. 30, 1993).[5] As noted in *Roller*,

[5]We are told that the California courts have ruled that this change in the law is procedural, *see In re Jackson*, 703 P.2d 100, 105 (Cal. 1985); *Morris v. Castro*, 166 Cal. App. 3d 33, 39-40, 212 Cal. Rptr. 299, 303-04 (1985), and that we should defer to this "finding." Terming a statute "procedural" does not make it so, *Collins*, 497 U.S. at 46; we thus do not think this is a factual inquiry. To be sure, we must defer to the state courts

" 'statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility . . . .' " *Id.* (quoting *Fender*, 883 F.2d at 306).

The respondents also contend the changes do not adversely affect Morales because it is unlikely that he would be granted parole within three years. This is irrelevant to the inquiry; Morales' claim does not depend on being able to demonstrate that he would have received parole sooner if he were granted annual parole hearings. *See Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 724-25 (9th Cir. 1993). It also does not matter that Morales lacks a vested right in parole or a particular parole date. "The presence or absence of an affirmative, enforceable right is not relevant . . . . Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver*, 450 U.S. at 30.

B. The Denial of Parole

The Board found Morales unsuitable for parole because he has an unstable and criminal history, his crime was particularly cruel and atrocious, he still represented a threat to others, and he needed further psychiatric counseling and treatment. Morales contends the Board violated his due process rights by relying on a probation report that contained inaccuracies.[6] In

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on the construction of their laws, but this case does not involve construction of the DSL; rather, it requires consideration of the Federal Constitution, and the inquiry does not call for any special degree of deference to the state courts. *Cf. Lindsey v. Washington*, 301 U.S. 397, 400 (1937); *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993).

[6]Morales also argues that dismembering an already-dead body is not torture, relying on *People v. Franc*, 218 Cal. App. 3d 588, 594-95 267 Cal. Rptr. 109, 112-13 (1990). Though this claim may be true (an issue we need not decide), dismembering a corpse may be considered evidence of a cruel, heinous, or atrocious crime. Moreover, nothing in the record clearly indicates when the dismemberment in this case occurred.

Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389 (9th Cir. 1987), this court held that a parole board's decision satisfied the requirements of due process "if *some* evidence supports the decision." *Id.* at 1390 (emphasis in original). "Additionally, the evidence underlying the board's decision must have some indicia of reliability." *Id.* A relevant factor in this latter inquiry is whether the prisoner was afforded an opportunity to appear before, and present evidence to, the board. *Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1017 (1988). In applying these standards to this case, it is important to note the falsehoods Morales complains about are relatively minor,[7] and nothing in the records clearly demonstrates that they are, in fact, falsehoods. The parole board's decision was based on evidence as required by *Jancsek;* specifically, Morales had previously been convicted of first degree murder and had committed the instant offense while on parole for that crime; the crime was heinous, atrocious, and cruel; and psychiatric reports indicated he should not be released. Finally, Morales not only had an opportunity to participate, but he took full advantage of that opportunity and, among other statements, denied any involvement in either murder. Based on the standards enunciated in *Pedro* and *Jancsek*, Morales' due process rights were not violated, and we affirm the district court's judgment on this count.

C. Improper Sentencing

Morales details the evolution of California's sentencing statutes relative to second degree murder. Although Morales' due process rights would be violated if he were sentenced to a term greater than permitted by law, *Marzano v. Kencheloe*, 915 F.2d 549, 552 (9th Cir. 1990), Morales fails to explain how his sentence of fifteen years to life is greater than that

[7]Some representative samples of the alleged inaccuracies include his national origin, his mother's national origin, the degree of planning involved in his crime, and a claim that he forged a diploma.

permitted by the statute then in effect, which called for this very sentence. *See In re Monigold*, 139 Cal. App. 3d 485, 490, 188 Cal. Rptr. 698, 701-02 (1983) (describing evolution in sentencing scheme). Perceiving no possible due process violation in Morales' sentence, we affirm the district court on this count.

III. CONCLUSION

At the time Morales committed his crime, the punishment for that crime included annual parole hearings. Accordingly, the retrospective application of a law allowing parole hearings to be delayed for up to three years is an ex post facto law in violation of the Constitution. The district court's judgment to the contrary is reversed with instructions to enter judgment in Morales' favor and requiring the Board to comply with the law as it existed at the time Morales' crime was committed.[*] We affirm the remainder of the district court's judgment because Morales' due process rights were not violated at sentencing or at the parole hearing.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[*]Nothing in this opinion should be viewed as an opinion on the wisdom or advisability of releasing Morales on parole.